STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY D. ATKINSON, Plaintiff-Appellant,	UNPUBLISHED December 17, 2013
v	No. 316510 Ingham Circuit Court Family Division
AMBER L. KNAPP f/k/a AMBER L. ATKINSON, Defendant-Appellee.	LC No. 08-001244-DM

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

The parties were married in 2001 and had one child together. The child was born in 2006. The parties divorced in 2008 and had joint legal and physical custody of the child. Plaintiff appeals as of right from a May 14, 2013 order of the trial court granting defendant's motion to change schools and parenting time. We reverse and remand to the trial court for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Once the child reached school age, she was enrolled in preschool in Lansing, where both parties then resided. In June 2011, defendant and her new husband moved to a community near Grand Rapids, although defendant continued to work in Lansing. The parties discussed enrolling the child in elementary school in Lansing. Defendant acknowledged that she did not ask that the child be enrolled in school in Grand Rapids. In September 2012, the child began attending elementary school in Lansing. In October 2012, defendant filed a motion to change schools and parenting time. Both a conciliator and referee recommended that defendant's motion be denied, and that the child remain enrolled in school in Lansing. Defendant objected to both recommendations; the latter is at issue here.

At the hearing held on defendant's objections, the trial court stated the following:

> Okay. So there's the decision. I'm going to tell the parents why I think they should come up with a solution because I'm going to tell you what I did to the last case.

> The parents came in at that time and they asked—one wanted the child to go to Okemos, the other child (sic) wanted the kids to go to Williamston. Much as you've indicated, counsel, the parties were both black and white. I sent the child to the Eaton Rapids school system. So, could I do that to your child? Yup. So I'm going to tell you you go into that conference room and come up with a resolution because if you don't then you live with what I tell you and if you don't like it that's too bad. So you better be able to compromise and say let's try this. That's your choices, okay? I hope you can come up with a solution because otherwise I will make the decision that fast. Thank you very much. Go talk and let me know when you're ready.

An order prepared by defendant's counsel was entered by the trial court on May 14, 2013 changing parenting time and the child's school from Lansing to Grand Rapids. Defendant asserts that the order was essentially a consent order because it represented an agreement the parties had reached in chambers. However, plaintiff maintains that no agreement was reached, and neither plaintiff's nor plaintiff's counsel's signature appears anywhere on the order. The record contains no evidence of any agreement reached between the parties.

II. STANDARD OF REVIEW

On appeal, this Court must affirm all custody orders unless the trial court's findings were against the great weight of the evidence, the trial court committed an abuse of discretion, or the trial court clearly erred on major legal issue. MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). A trial court's findings of fact, including whether proper cause or a change in circumstance has been established, is reviewed under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, this Court gives deference to the trial court's findings unless "the trial court's findings clearly preponderate in the opposite direction." *Id*. (internal quotation marks and citation omitted). This Court reviews for an abuse of discretion the trial court's discretionary rulings. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). When deciding custody matters, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*. Finally questions of law are reviewed for clear legal error. *Id*. at 706.

III. ANALYSIS

Plaintiff raises three arguments on appeal; one is dispositive. As a threshold matter, we do not find that the trial court erred in allowing defendant's objection to the referee's recommendation. Defendant's objection was timely and contained "a clear and concise statement of the specific findings or application of law to which an objection was made." MCR 3.215(E)(4). Specifically, defendant clearly objected to the referee's finding that it was in the child's best interests to attend school in Lansing, and the finding that both parties were equally able to care for the child. Although plaintiff characterizes defendant's objection as a "recycling" of her initial objections to the conciliator's recommendation, the court rule does not require defendant to craft new objections where, as here, the conciliator and the referee made similar findings. Plaintiff was not denied the opportunity to tailor his defense to the matters at

issue. Further, plaintiff argues that defendant did not establish the threshold requirements necessary for the trial court to review a change of custody. As stated below, we do not find so on the record before us, and remand for the trial court to consider, inter alia, the threshold issue of proper cause or change in circumstances. MCL 722.27(1)(C); *Vodvarka v Grasymeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003). Finally, plaintiff argues that the trial court erred in changing parenting time and the child's school without holding a de novo hearing. We agree.

MCL 552.507(4) provides that a trial court "shall hold a de novo hearing on any matter that has been the subject of a referee hearing." MCR 3.215(F)(2) sets forth certain procedures a court must follow when holding a de novo hearing:

> To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
>
> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

Further, when deciding a custody matter the trial court must review all the statutory best-interest factors. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). The trial court is obligated to make specific findings and state its conclusions on each best-interest factor. *Id*. at 330. If the trial court fails to make findings on the best-interest factors then the case must be reversed and remanded for a new child-custody hearing. *Id*.

The record reflects that the trial court did not review anything relating to the child custody issue at hand. Nor did the trial court make the proper findings and conclusions regarding the best-interest factors. Instead, the court simply directed the parties, quite overtly and pointedly, to reach an agreement. The court used a result it said it had reached in a prior case to not so subtly let the parties know that the court could reach a conclusion with which neither would be happy. Although the parties held a conference at the court's request, the record does not indicate that any agreement was reached.[1]

[1] The fact that defendant submitted an order to the trial court, pursuant to MCR 2.602(B)(3), which the court thereafter entered, does not evidence that an agreement was reached.

Moreover, the court did not specifically respond to plaintiff's position that the court should find the referee's findings to be conclusive without holding a de novo hearing. The court could have concluded that defendant had not established the requirements for holding a hearing, and could therefore have declined to hold a hearing on that ground. But the court did not do this. Instead, the court seemed to indicate that it would render a decision (presumably after a hearing) if the parties did not reach an agreement. We take this to be an implicit rejection of plaintiff's position, particularly in light of the court's subsequent order changing school and parenting time (contrary to the referee's recommendation), without the benefit of a de novo hearing or an evaluation of the best interest factors. But in any event, the trial court should not have changed school and parenting time without holding the requisite de novo hearing and making appropriate findings on the best interest factors.

The court had some discretion in how to approach the de novo hearing, but it did not have the discretion to disregard the clear directive that it "shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court." MCL 552.507(4). The remedy for denial of a de novo hearing is to remand to allow the parties to raise objections to the referee's report. See *Harvey v Harvey*, 257 Mich App 278, 292; 668 NW2d 187 (2003), aff'd on other grounds 470 Mich 186 (2004).

Because we remand for the trial court to hold a de novo hearing if appropriate, we decline to determine if defendant met the threshold requirement of establishing proper cause or a change in circumstances so as to warrant a hearing on modification of child custody. See MCL 722.27(1)(C); *Vodvarka*, 259 Mich App at 512-514. On remand, the trial court should make the necessary determination of whether defendant has established proper cause or change in circumstances and, if it finds that defendant has met this threshold, hold a de novo hearing in which it makes the requisite best-interest factor determinations.

Reversed and remanded to the trial court for further proceedings consistent with this opinion and the applicable court rules. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering

MCR 2.602(B)(3) provides that a party may submit an order for entry within seven days after the trial court grants a judgment or order. If a party does not file written objections within seven days, "the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision." However, prior to the entry of the order itself, the trial court never indicated on the record that it was granting any relief. The record therefore does not reflect that the trial court had made any decision with which the submitted order could comport, as is required by MCR 2.602(B)(3). This fact, combined with plaintiff's denial that any agreement was reached, leads us to conclude that plaintiff's lack of objection to the submitted order is not fatal to his claim. Moreover, we note that if the parties had in fact reached an agreement, they more easily could have submitted a stipulated order to the court, signed by both parties (or their counsel), rather than proceeding under the more cumbersome procedures outlined in MCR 2.602(B)(3).